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No. 93-1090

In The

Supreme Court of the United States

October Term, 1993

BRYANT MILLSAPS, et al.,

Appellants,

v.

PHILLIP R. LANGSDON, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

REPLY BRIEF

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ARGUMENT

The decision of the district court published as *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter,* 836 F. Supp. 447 (W.D. Tenn. 1993) is in conflict with a decision of a three-judge panel from Maryland issued on January 14, 1994 in the case of *Marylanders for Fair Representation, Inc. v. Schaefer,* slip op., pp. 22-26 (D. Md. 1994) (copy of opinion which totals 110 pages is lodged with the Clerk of this Court). The *Marylanders* Court was confronted with a reapportionment plan for the House of Delegates with a population deviation of 10.67%. In discussing the standard for determining the constitutionality of a plan over the de minimus of 10%, the *Marylanders* Court stated the following:

> MFR [Marylanders for Fair Representation], claiming to state the standard enunciated in *Voinvoich,* argues that the State must demonstrate that the deviation is *required* in order to advance a rational state policy. *See* Opp'n Mem. at 6. This is simply not the standard that has been established for evaluating deviations in state legislative redistricting plans. Rather, MFR has stated the test for *congressional* redistricting cases as set out in *Karcher,* 462 U.S. at 741. The *Karcher* decision is applicable to state legislative redistricting cases to the extent that it expressly recognizes several state policies that might justify deviations from population equality. The requirement in *Karcher* that the asserted state policy actually be the reason for the deviation is equally applicable to state redistricting cases. However, it is well established that the one person, one vote standard for congressional redistricting is far more demanding than the

> standard for legislative redistricting plans. *See Mahan*, 410 U.S. at 321-22; *Reynolds*, 377 U.S. at 578. As the defendants correctly point out, the appropriate test to be applied in state legislative redistricting cases is more akin to a rational basis test.

Marylanders, slip op. at 13-14.

In this case, the district court followed the "required" standard in *Karcher* for congressional districts instead of the rational basis test for state legislative districts as stated in the *Marylanders* case. Since the district court embraced the plaintiffs' hypothetical plan as furthering the state's interest in maintaining the integrity of county lines while keeping the deviation under 10%, the deviation of 13.9% under Chapter 836 could not under the rationale of the district court be "required" to further the state's rational policy regarding the division of counties. This standard is higher than the rational basis test and was rejected by the district court in the *Marylanders* case for state legislative districts. Such a conflict between these two three-judge panels provides a sufficient basis for this court to note probable jurisdiction in this case.

The *Marylanders* Court also recognized the state policies which might justify a deviation above 10% including "respecting the boundaries of political subdivisions, preserving cores of prior districts, avoiding contests between incumbents, and due regard for natural boundaries." *Marylanders*, slip op. at 23 (citations omitted). By holding that the plaintiffs' alternate plan requires a reapportionment plan of under 10%, the district court in this case has precluded as a matter of law consideration of any justifications for the 13.9% deviation in Chapter 836. Indeed,

the district court subsequently rejected two justifications asserted by the defendants: (1) failure of the plaintiffs' hypothetical plan to comply with the Voting Rights Act by packing at least five districts with 70% to 96% African-American voting age population; (2) consideration by the Tennessee General Assembly of the census undercount in urban areas such as Davidson County-Nashville where the deviations exceed negative 5% in order to compensate for disproportionate undercounting of minorities in those areas.

CONCLUSION

By embracing the plaintiffs' hypothetical plan, which has a deviation of under 10% and divides fewer counties than Chapter 836, the district court has precluded the defendants as a matter of law from introducing any rational state policies to justify the 13.9% deviation. As the *Marylanders* Court stated, the standard is not that "the State must demonstrate that the deviation is *required* in order to advance a rational state policy," but the "appropriate test to be applied in state legislative redistricting cases is more akin to a rational basis." *Marylanders*, slip op. at 13-14. The defendants have not been given the opportunity in this case to justify the deviation under

such a rational basis test. Accordingly, this Court should note probable jurisdiction.

Respectfully submitted,

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